Dato' Kanalingam a/l Velupillai v Bar Council & Anor

HIGH COURT (KUALA LUMPUR) — CIVIL APPEAL NO R–17B–157 OF 2002
AZMEL, ZULKEFLI AND ZAINUN ALI JJ
29 FEBRUARY 2004

Administrative Law — Natural justice — Breach — Composition of Disciplinary Board — Presence of unqualified person — Whether breach of rules of natural justice — Legal Profession (Disciplinary Board) (Procedure) Rules 1994 r 4

Civil Procedure — Appeal — Decision of Disciplinary Board — Appeal against — Legal Profession Act 1976 s 103E

The second defendant (the second respondent) made a decision that the two complaints made by the first defendant (the first respondent) had merit and decided to constitute an Investigating Tribunal to inquire into the said complaints pursuant to s 100(1) of the Legal Profession Act 1976. The appellant's appeal was based on the composition of the Disciplinary Board that had determined that there was merit in the complaint and decided to constitute an Investigating Tribunal to investigate the complaint against the appellant. The appellants' argument was that since the Bar Council was the complainant, the president of the Bar Council was or his alternate should be a disqualified person to be a member of the Disciplinary Board. A preliminary issue was whether the court had jurisdiction to entertain an appeal from a decision of the second respondent to appoint an Investigation Tribunal to investigate and report, since such decision was not a final decision on the merits of the complaint.

Held, allowing the appeal:

(1) Section 103E(1) of the Legal Profession Act 1976 refers to 'any decision or order of the Disciplinary Board which is appealable to the High Court'. The decision for the second respondent therefore to constitute an Investigating Tribunal to investigate the said complaints against the appellant was a decision within the meaning of s 103E(1). As such the High Court would have the jurisdiction to hear the appeal by the appellant against the decision of the second respondent in accordance with the clear and unambiguous wordings of s 103E(1) of the Act (see para 17).

(2) Since the second respondent had refused to reveal the names of the members of the Disciplinary Board after having twice been requested by the appellant, the presumption under s 114(g) of the Evidence Act 1950 is applicable (see para 21).

(3) In the light of the invocation of s 114(g) of the Evidence Act 1950 in that composition of the members of the second respondent was unlawful because of the presence of an unqualified person, the decision of the second respondent to constitute the Investigating Tribunal was void ab initio (see para 25).

(4) With the presence of the Bar Council the provision of r 4 of the Legal Profession (Disciplinary Board) (Procedure) Rules 1994 had been breached. The second respondent therefore had failed to observe the basic rules of natural justice when they deliberated on the complaint of the first respondent against the appellant (see para 26).

[**Bahasa Malaysia summary**

Defendan pertama (responden kedua) telah membuat keputusan bahawa dua aduan yang dibuat oleh defendan pertama (responden pertama) mempunyai merit dan memutuskan untuk membentuk satu Tribunal Siasatan untuk menyiasat aduan-aduan tersebut menurut s 100(1) Akta Profesyen Undang-Undang 1976. Rayuan perayu adalah berdasarkan pembentukan Lembaga Tatatertib yang perlu menentukan bahawa terdapat merit dalam aduan tersebut dan telah memutuskan untuk membentuk satu Tribunal Siasatan untuk menyiasat aduan terhadap perayu. Hujah perayu adalah memandangkan Majlis Peguam merupakan pengadu, presiden Majlis Peguam telah atau alternatifnya patut digugurkan sebagai ahli Lembaga Tatatertib. Satu persoalan awal adalah sama ada mahkamah mempunyai bidang kuasa untuk melayan rayuan berhubung keputusan responden kedua untuk melantik Tribunal Siasatan untuk menyiasat dan melapor, memandangkan keputusan tersebut bukan keputusan muktamad berdasarkan merit pengadu.

Diputuskan, membenarkan rayuan tersebut:

(1) Seksyen 103E(1) Akta Profesyen Undang-Undang 1976 merujuk kepada 'any decision or order of the Disciplinary Board which is appealable to the High Court'. Keputusan untuk responden kedua membentuk satu Tribunal Siasatan untuk menyiasat aduan-aduan tersebut terhadap perayu adalah satu keputusan dalam maksud s 103E(1). Oleh itu Mahkamah Tinggi akan mempunyai bidang kuasa untuk mendengar rayuan oleh perayu terhadap keputusan responden kedua bersesuaian dengan perkataan-perkataan yang jelas dan tak taksa s 103E(1) Akta tersebut (lihat perenggan 17).

(2) Memandangkan responden kedua enggan untuk mendedahkan nama-nama ahli Lembaga Tatatertib selepas dua kali dipohon oleh perayu, andaian di bawah s 114(g) Akta Keterangan 1950 adalah terpakai (lihat perenggan 21).

(3) Berdasarkan penggunaan s 114(g) Akta Keterangan 1950 berhubung pembentukan ahli-ahli responden kedua adalah menyalahi undang-undang kerana kehadiran seorang yang tidak layak, keputusan responden kedua untuk membentuk Tribunal Siasatan adalah terbatal ab initio (lihat perenggan 25).

(4) Dengan kewujudan Majlis Peguam peruntukan k 4 Kaedah-Kaedah Profesyen Undang-Undang (Lembaga Tatatertib) (Prosedur) 1994 telah dilanggar. Responden kedua oleh itu telah gagal untuk meneliti kaedah-kaedah am keadilan semulajadi semasa meneliti aduan responden pertama terhadap perayu (lihat perenggan 26).]

Notes

For cases on breach of natural justice, see 1 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 180–181.

For cases on appeals against decision of Disciplinary Board generally, see 2(3) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 558–623.

For breach of natural justice, see 9 *Halsbury's Laws of Malaysia* paras [160.091]–[160.108].

Cases referred to

Duport Steels Ltd & Ors v Sirs & Ors [1980] 1 WLR 142 (refd)
Rohana bte Ariffin & Anor v Universiti Sains Malaysia [1989] 1 MLJ 487 (refd)
Stollery v Greyhound Racing Control Board (1972) 128 CLR 509 (refd)

Legislation referred to

Evidence Act 1950 s 114(g)
Interpretation Acts 1948 and 1967 s 17
Legal Profession (Disciplinary Board) (Procedure) Rules 1994 r 4(1)
Legal Profession Act 1976 ss 93(3), 100(1), 103E

V Sithambaram (KT Wong with him) (V Siva & Partners) for the appellant.
BP Vendargon (T Kunaseelan with him) (Gunaseelan & Assoc) for the first respondent.
Kevin Wong (Tommy Thomas) for the second respondent.

Azmel J:

[1] This is an appeal by the appellant under s 103E of the Legal Profession Act 1976 ('the said Act') against the whole of the decision of the second defendant vide letter dated 21 November 2003. The second respondent had made a decision that the two complaints made by the first respondent vide letter dated 6 August 2002 had merit and decided to constitute an Investigating Tribunal to inquire into the said complaints pursuant to s 100(1) of the said Act.

The background

[2] By a letter dated 6 August 2002, the first respondent lodged a complaint with the second respondent against the appellant. The letter states:

> Bil Kami: BC/COMP/27/2002(db)
>
> 6 August 2002
>
> Director
>
> Disciplinary Board
>
> 8th & 9th Floor, Wisma Maran
>
> 28, Medan Pasar
>
> 50050 Kuala Lumpur
>
> Dear Madam,
>
> RE: COMPLAINTS AGAINST DAW KANAGALINGAM S/O VELLUPILLAI OF M/S VK LINGAM & CO BY THE BAR COUNCIL
>
> Pursuant to Section 99(3) of the Legal Profession Act 1976 ('the said Act'), the Bar Council is making two complaints against the above mentioned solicitor ('the Respondent'). The brief facts are as follows:
>
> First Complaint:
>
> 1 On or about February 1998, the Bar Council received information that a photograph showing the Respondent on holiday with the Chief Justice, Tun

Dato' Seri Haji Mohd Eusoff bin Chin, had been seen on the Internet. The Bar Council was able to verify this information by accessing the Internet and downloading a copy of the said photograph. A copy of the said photograph is annexed hereto and marked 'BC-1'.

2 On 27.8.98, the Bar Council sent a letter to the Respondent by hand requesting for the Respondent's comments with regard to the said photographs within fourteen days from the said date. As there was no response, the Bar Council issued two letters of reminder, delivered by hand, dated 29.9.98 and 7.10.98. There was no reply to any of the said letters. Copies of the said letters are annexed hereto and collectively marked 'BC-2'.

3 A final letter of reminder dated 16.11.98 was sent to the Respondent by hand specifically drawing the attention of the Respondent to Ruling 10(b), Part H of the Rulings of the Bar Council 1977 on 'Courtesy' wherein it is stated:

'An advocate and solicitor must promptly reply to correspondence from fellow advocates and solicitors, the Bar Council, State Bar Committee, clients and former clients.'

The Respondent also put on notice that a breach of the said Ruling could lead to disciplinary proceedings being taken against him but the Respondent failed to respond. A copy of the said letter dated 16.11.98 and an extract of Ruling 10(b) are annexed, hereto and marked 'BC-3' to 'BC-4' respectively.

Second Complaint:

4 In an article published by the *Star* newspaper dated 31.8.99, it was reported that *Asian Wall Street Journal* correspondent, Mr Raphael Pura had alleged in his amended statement of defence that judgment by High Court Justice Mokhtar Sidin (as he then was) in the case of *Tan Sri Vincent v MGG Pillai* and others was 'written in part by the plaintiffs counsel Datuk VK Lingam' and initially typed by 'Lingam's secretaries one Jayanthi and Sumanthi.' It was further reported, that Pura claimed that the final draft was 'despatched to the said learned judge on floppy disk'. A copy of the said article is annexed hereto and marked 'BC-5'.

The Bar Council is of the view that the Respondent has breached r 31 of the Legal Profession (Practice and Etiquette) Rules 1978 and that the Respondent's actions amount to misconduct under ss 94(3)(d), 94(3)(k) and 94(3)(o) of the said Act.

I shall be obliged if you could please inquire into the above complaints pursuant to s 100 of the said Act

Thank you.

Sgd

Mah Weng Kwai

President

Encl

cc

[3] There were no other complaints made against the appellant to the second respondent by the first respondent or by anyone else. By a letter dated 28 October 2002, the appellant forwarded his brief explanation in respect of the said complaints made by the first respondent. However by a letter dated 21 November 2002, the second respondent informed the appellant that the second respondent had determined that there was merit in the said

complaints and decided to constitute an Investigating Tribunal to inquire into the said complaints pursuant to s 100(1) of the said Act. That letter was served on the appellant on 25 December 2002.

[4] Against this decision of the second respondent, the appellant lodged an appeal to this court on 23 December 2002.

[5] The appellant had written two letters dated 27 November 2002 and 26 December 2002) to the second respondent requesting, among other things:

(a) Attendance sheet of all members who attended the Disciplinary Board Meeting which deliberated upon the Bar Council Complaint.

(b) The full and complete minutes of the Disciplinary Board which decided to constitute the Investigating Tribunal to inquire into the said Complaint.

[6] On 13 November 2003, the second respondent replied rejecting the appellant's request. The relevant portion of the letter states:

> We are however unable to accede to your request under items (d), (e) and (f) as we are not at liberty to furnish the same.

[7] The appellant's request under items (d) and (e) are as per para (a) and (b) of the above quoted letter.

[8] In this appeal, the appellant had given 15 grounds of appeal in his memorandum of appeal (see pp 1–7 of the Rekod Rayuan Vol 1). Upon perusal of the memorandum of appeal we were of the view that for purposes of this appeal only ground No 4 was relevant. It states:

> 4 The decision of the second respondent was tainted and vitiated by gross bias as the office bearers/council members of the first respondent who was the complainant sat and participated in the decision making process of the second respondent to constitute an Investigating Tribunal to inquire into the complaints.

[9] Before proceeding any further, we wish to point out that there were two minor applications made by the parties. Firstly, the second respondent applied to withdraw as a party to this action. There were no objections by the appellant and the first respondent. As such, we allowed the second respondent's application with no order as to costs. However for purposes of *identification only*, we continued to use the term 'second respondent' when referring to Lembaga Tatatertib Peguam-Peguam. Secondly, the appellant had applied to amend the name of the first respondent from 'the Bar Council' to 'the Malaysian Bar'. Again, there was no objection by any party to this application. As such, we allowed it without any argument.

First respondent's preliminary objection

[10] The counsel for the first respondent had raised a preliminary point of law and submitted that this court has no jurisdiction to entertain an appeal from a decision of the second respondent to appoint an investigation tribunal to investigate and report, since such decision is not a final decision on the merits of a complaint.

[11] In support of his argument, the learned counsel contended that this court should adopt the purposive approach to statutory interpretation as has been entrenched by s 17 of the Interpretation Acts 1948 and 1967.

[12] The learned counsel for the first respondent further submitted that the said decision of the second respondent was only a preliminary one and not a final decision on the merits of the said complaints. The said decision was only taking a step in investigating a complaint and therefore it was not a final decision affecting the personal and professional livelihood of the appellant.

[13] In reply, the counsel for the appellant submitted that on a plain and simple reading of s 103E(1) of the said Act, it provides that any aggrieved party can appeal against any decision or order of the Disciplinary Board and hence the appellant being the aggrieved party 'shall have the right to appeal to the High Court' against the decision of the second respondent to initiate a formal investigation against him. In this particular case, the second respondent had made *a decision*. The appellant's counsel further submitted that to restrict the appeal only after the Investigating Tribunal had completed its investigation and made its recommendation to the Disciplinary Board would tantamount to going against the letter and spirit of s 103E(1) of the said Act.

[14] The appellant's counsel urged the court to interpret the law in accordance to the clear words of the statute and not in accordance with the intended policy. The purposive approach should only be used if there was ambiguity in the wordings of the statute. The counsel referred to the House of Lords case of *Duport Steels Ltd & Ors v Sirs & Ors* [1980] 1 WLR 142 where at p 157 Lord Diplock held:

> … Where the meaning of the statutory words is plain and unambiguous it is not for the judges to invent fancied ambiguities as an excuse for failing to give effect to the plain meaning because they themselves consider that the consequences of doing so would be inexpedient or even unjust or immoral …

[15] For ease of reference, the material paragraph of the second respondent's letter of 21 November 2002 to the appellant is reproduced:

> Please be informed that pursuant to s 100(1) of the Legal Profession Act 1976 (asamended), the Disciplinary Board has determined that there is merit in the said complaint and decided to constitute an Investigating Tribunal to inquire into the complaint.

[16] After having considered the arguments from both sides, we were more inclined to agree with the submission by the counsel for the appellant. If the wordings of the statute are clear and unambiguous then it would not be prudent for the court to look into the purpose for which the law is enacted. Section 103E(1) of the Act reads:

> Any party aggrieved by any decision or order made by a Disciplinary Board shall have the right to appeal to the High Court within one month of notification of the decision or order complained against.

[17] This section talks about *any* decision or order of the Disciplinary Board which is appealable to the High Court. In our view, the decision of the second respondent to constitute an Investigating Tribunal to investigate the said complaints against the appellant was a decision within the meaning of s 103E(1). As such, this court would have the jurisdiction to hear the appeal by the appellant against the decision of the second respondent in accordance with the clear and unambiguous wordings of s 103E(1) of the said Act.

[18] We wish to emphasize that our consideration of this appeal by the appellant was basically in respect of the composition of the Disciplinary Board that had determined there was merit in the complaint and decides to constitute an Investigating Tribunal to investigate the complaint against the appellant.

[19] Under s 93(3) of this said Act, the composition of the Disciplinary Board shall consist of, among others, the following:

(a) …

(b) the President of the Bar Council with the Vice-President as his alternate;

[20] Rule 4(1) of the Legal Profession (Disciplinary Board) (Procedure) Rules 1994 states:

> Where the Bar Council is the complainant or where the Bar Council intervenes under rule 8 of the Legal Profession (Disciplinary Proceedings) (Investigating Tribunal and Disciplinary Committee) Rules 1994, the President of the Bar Council or his alternate, as the case may be, shall be disqualified as member of the Disciplinary Board for the purpose of the quorum.

[21] In this case, it is common ground that the Bar Council was the complainant. As such, the President of the Bar Council or his alternate would be a disqualified person to be a member of the Disciplinary Board. Such being the situation, it would be very essential to ensure that the President of the Bar Council or his alternate was not a member of the Disciplinary Board when it made the decision to constitute the Investigating Tribunal to investigate the complaints against the appellant. Towards this end, the appellant had written to Disciplinary Board (second respondent) requesting for the names of the members who attended the Disciplinary Board Meeting which deliberated the Bar Council complaint. But in its reply the second respondent refused to accede to the appellant's request. In our view, in order to ensure that unqualified persons do not attend the meetings, it was almost essential for the second respondent to respond positively to the appellant's request and reveal the names of the members attending the said meeting. Because the second respondent refused to reveal the names of the members who attended the said meeting, s 114(g) of the Evidence Act 1950 can be invoked, thereby raising the presumption that the President of the Bar Council or his alternate was present at the said meeting. It is essential whenever the second respondent make any decision or order the rules of natural justice must be adhered to and elements of biasness be removed. We need only to refer to the case of *Rohana bte Ariffin & Anor v Universiti Sains Malaysia* [1989] 1 MLJ 487 where Edgar Joseph Jr J (as he then was) held (at p 489):

> ... the proceedings before the disciplinary authority were contrary to natural justice owing to the presence of the registrar of the respondent university, the complaint of both applicants during the disciplinary authority's deliberation.

[22] In his judgment, his Lordship had referred the Australian case of *Stollery v Greyhound Racing Control Board* (1972) 128 CLR 509, and quotes the decision of Menzies J as follows:

> A long line of authority establishes that the decision of a tribunal whose duty is to act judicially, will be invalidated if, while the tribunal deliberates and reaches a finding

adverse to a person whose conduct is under scrutiny, there is present some person, who, in fairness, ought to be there.

[23] In the same Australian case, Gibbs J made the following decision:

> It is, however, clear that it would not be in accordance with the principles of natural justice for a person who was in truth the accuser to be present as a member of a tribunal when the charge which he had promoted was heard, even if he took no actual part in the proceedings … The very presence of a person who has brought forward a complaint may, even unconsciously, inhibit the discussions and affect the deliberations of the other members of the tribunal.

[24] In this instant case, because the second respondent refused to reveal the names of the members of Board after having twice been requested by the Appellant we had no doubts whatsoever that the presumption under s 114(g) of the Evidence Act 1950 be applied. In the light of the circumstances, we had to assume that the President of the Bar Council or his alternate was present at the decision making session.

[25] In the light of the invocation of s 114(g) of the Evidence Act 1950 in that the composition of the members of the second respondent was unlawful because of the presence of an unqualified person it was our considered view that the decision of the second respondent to constitute the Investigating Tribunal was void ab initio. To allow the second respondent to continue to act further until the completion of the investigation by the Investigating Tribunal would be a sheer waste of time and serve no useful purpose. In such circumstances, we were of the opinion that the consideration of the appeal by the appellant was timely and legally appropriate.

[26] It is therefore our finding that after being requested by the appellant, the second respondent's refusal to reveal the names of the members attending the meeting that determined that the complaint against the appellant had merit and decided to constitute the Investigating Tribunal to investigate the first respondent's complaint against the appellant would clearly give rise to the presumption under s 114(g) of the Evidence Act 1950 that the President of the Bar Council or his alternate was present at the said meeting. And with the presence of the President of the Bar Council the provision of r 4 of the Legal Profession (Disciplinary Board) (Procedure) Rules 1994 had been breached. We therefore concluded that based on the authorities cited above the second respondent had failed to observe the basic rules of natural justice when they deliberated on the complaint of the first respondent against the appellant.

[27] It was on this ground that we unanimously allowed the appeal by the appellant with costs.

Appeal allowed.

Reported by Mariette Peters-Goh